

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARMEN PATRICIA BAKER

Claimant

VS.

UNIFIED SCHOOL DISTRICT 259

Respondent

Self-Insured

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Docket No. 1,007,386

ORDER

Respondent appealed the March 17, 2004 Award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on June 15, 2004, in Wichita, Kansas.

APPEARANCES

David H. Farris of Wichita, Kansas, appeared for claimant. Gary K. Albin of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, during oral argument to the Board, the parties agreed to an accident date of September 25, 2001, as found by the ALJ.

ISSUES

The ALJ found that claimant suffered a 14 percent impairment of function to the body as a whole as a result of her work-related injuries to her left knee and low back. The ALJ further found that claimant was entitled to a permanent partial disability for a 68 percent work disability based upon a 100 percent wage loss and a 36 percent task loss from October 8, 2002, the date of her termination, until September 3, 2003, the date she was rehired by respondent in a part-time position. Beginning September 3, 2003, claimant's wage loss changed to 69 percent. Accordingly, her permanent partial disability became 52.5 percent.

Respondent admits that claimant suffered a compensable left knee injury, but disputes claimant suffered any permanent impairment to her back. Accordingly, respondent argues that claimant's permanent partial disability award should be limited to a scheduled injury for her 20 percent functional impairment to the left leg, based on the rating by John P. Estivo, D.O. In the alternative, should claimant be found to have suffered a general body disability, respondent contends that claimant failed to make a good faith job search after she was rehired and returned to work on a part-time basis for respondent. As a result a full time wage should be imputed to claimant based upon her ability to earn wages. Respondent argues claimant retains the ability to earn \$280 per week which would result in a wage loss of 52 percent rather than the 69 percent actual wage loss utilized by the ALJ.

Conversely, claimant argues that her task loss should be increased to 58 percent but that the ALJ's award should otherwise be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties arguments, the Board finds and concludes that the ALJ's Award should be affirmed. The Board adopts the findings, conclusions and orders of the ALJ set forth in the Award.

Respondent argues that claimant failed to prove she suffered a permanent low back injury. Respondent bases its contention primarily upon the testimony of the treating physician, Dr. Estivo and the fact that his office notes fail to mention back complaints over the approximately 10 month period that he treated her. However, Dr. Estivo's records do refer to claimant's antalgic gait. Claimant had ongoing problems and symptoms in her left knee for which Dr. Estivo performed two surgeries. As a result, claimant walked with a limp. There is some dispute in the record as to whether or not claimant simultaneously injured her back in the accident that injured her knee and, if so, whether that back injury resolved. Nevertheless, claimant reported back symptoms to both Pedro A. Murati, M.D., and C. Reiff Brown, M.D. Both doctors concluded claimant's antalgic gait aggravated an underlying degenerative condition and resulted in permanent impairment to the low back. Based on the record as a whole, the Board agrees with the ALJ's finding that claimant has established a general body disability.

Once a general body disability is established, the parties do not dispute that claimant is entitled to a work disability following her termination from employment by respondent. Furthermore, the parties agree that claimant made a good faith effort to find work and is therefore entitled to a 100 percent wage loss during the period she was not employed. Beginning September 3, 2003, claimant returned to work for respondent on a part-time basis. She was earning an average of \$181.48 per week which, when compared to her average weekly wage of \$581.68, results in an actual wage loss of 69 percent. Respondent contends that claimant failed to continue with her job search after she returned to work with respondent part-time. It is respondent's contention that claimant was

under-employed, working only 17.5 hours per week, earning \$10.37 per hour. Respondent argues that it is not good faith for a worker that is capable of working full-time and earning more money not to continue to look for full time employment. As a general rule the Board agrees with this contention. However, in this case the record does not support respondent's contention that claimant abandoned her job search efforts after beginning her part-time employment.

The regular hearing was held on September 29, 2003, or just over three weeks after claimant returned to work for respondent. This is not much time on which to base a determination of good faith effort. Furthermore, during her regular hearing testimony, claimant was not specifically questioned about her job search efforts during this period.

At respondent's request, claimant was interviewed by vocational expert Monty Longacre on October 21, 2003. The purpose of that interview was primarily for Mr. Longacre to prepare a task list for then presenting to a physician in order to obtain an opinion on claimant's task loss. Nevertheless, it appears the matter of claimant's job search was also discussed. Mr. Longacre made several suggestions to claimant about how she might improve her job search efforts but vocational placement services were not otherwise offered. The obvious implication from Mr. Longacre's report and subsequent testimony is that claimant was still looking for work when he met with her in October 2003.

Claimant initially has the burden of proving she made a good faith effort to obtain appropriate employment post-accident.¹ But at some point that burden may shift to respondent.² The parties agree that claimant made a good faith job search until September 3, 2003, when she found part-time employment with respondent. The only evidence is that claimant continued looking for work thereafter. Although there is evidence that improvements could be made to claimant's job search, the Board finds no reason to disturb the ALJ's finding that claimant continued making a good faith job search. Therefore, the Board agrees with the ALJ's findings concerning claimant's percentages of wage loss.

Finally, the Board likewise affirms the ALJ's finding that claimant suffered a 36 percent task loss. In so finding, the ALJ relied upon the testimony of the court appointed independent medical examiner, orthopedic surgeon C. Reiff Brown, M.D. The Board agrees that this is the most credible opinion.

WHEREFORE, the Board affirms the March 17, 2004 Award of Administrative Law Judge John D. Clark.

¹ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

² *See Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 59 P.3d 352 (2002).

IT IS SO ORDERED.

Dated this ____ day of June 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Attorney for Claimant
Gary K. Albin, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director